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No. 93-1172

IN THE

Supreme Court of the United States

October Term, 1993

JAMES ALBERT ELKINS, SR.; MARY JO ELKINS, as parents and natural guardians of JAMES ALBERT ELKINS, II,

Petitioners,

v.

RICHARDSON-MERRELL, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases: **Page**

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 2

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) . . . . . *passim*

Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510 (1993) 4

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) 4

Constitutional Provisions, Statutes and Rules:

Fed.R.Civ.P. 56(c) . . . . . *passim*

Fed.R.Civ.P. 56(e) 2

REPLY TO BRIEF IN OPPOSITION

The parties in this case are in agreement that serious confusion and conflict exist among the lower federal courts over the proper interpretation of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), concerning the nature of a movant's burden on a summary judgment motion. As explained by the Petition ("Pet.") at 7, and as respondent Merrell nowhere contests, these problems emanate from a single paragraph in the majority opinion in *Celotex*. The beginning of the paragraph states that the movant "always bears the initial responsibility of . . . identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (quoting Rule 56(c)). But the end of the paragraph states that summary judgment may be granted on the basis of "whatever is before the district court." *Id.*

What is a movant's burden under *Celotex*? Must a movant "show," by reference to one or more of the five record items listed in Rule 56(c), that no genuine factual issue on a given point exists? Or, does the idea that summary judgment may be granted based on "whatever is before the district court" permit the movant to satisfy its burden based on materials *outside* the record?[1] Is a district court to grant summary judgment for

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[1] For example, in its opposition Merrell suggests for the first time in the course of this three-year-old proceeding that it satisfied its burden because its summary judgment brief and attachments to that brief: (1) provided summaries of 35 human epidemiology studies published in the world's scientific and medical literature," (2) provided "documents from the Food and Drug Administration," (3) "cited (and in some instances provided copies of) numerous previous decisions rendered in other Bendectin cases," and (4) "supplied excerpts of previous testimony of a number of Petitioners' expert witnesses" — that is, *two* of petitioners' *six* expert witnesses (without relating that previous testimony to the facts of this case). Brief of Respondent Richardson-Merrell, Inc. in Opposition to Petition for Writ of Certiorari ("Opp.") at 3-4 & n.8; *see also* Opp. at 9. None of these four items is of the type listed in Rule 56(c).

Whether or not such materials *if considered by the district court in assessing Merrell's burden as movant* would in fact support Merrell's view about the safety of Bendectin is irrelevant to the Petition, which addresses a purely legal issue about the meaning of *Celotex*. Such factual details would be considered only on remand, if Merrell persuaded this Court to construe

reasons that were never advanced in the motion, and that the nonmovant was never permitted to address in the opposition?[2]

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expansively the reference in *Celotex* to "whatever is before the district court." Therefore, petitioners will not address Merrell's gratuitous statements about the asserted harmlessness of Bendectin. *See* Opp. at 1-4.

[2] For example, in this case Merrell makes much of the fact that *after* it filed its summary judgment motion, the Sixth Circuit held in two other Bendectin cases that *the plaintiffs* in those cases had not mustered sufficient admissible evidence to defeat Merrell's summary judgment motion. *See* Opp. at 1, 9. This is hardly news. The petition forthrightly noted that the causation evidence petitioners put forward in their summary judgment opposition is similar to that presented by the earlier plaintiffs and, "[o]n the strength of [these two Sixth Circuit cases], the district court held that Elkins' expert affidavits on causation were insufficient to defeat summary judgment. The Sixth Circuit agreed with this holding, a point on which Elkins does not now seek review in this Court." Pet. at 3 n.4 (citations omitted). Merrell falsely suggests that petitioners' decision to set aside issues concerning the admissibility and sufficiency of the evidence *they* submitted under Rule 56(e) in opposing summary judgment, in the aftermath of two intervening Sixth Circuit decisions finding problems with that evidence, constitutes some sort of "admission" that Merrell met its threshold Rule 56(c) burden. But Merrell's motion did not reference those two Sixth Circuit decisions or any supposed "admission" based on them (as those decisions were announced well after Merrell filed its motion), petitioners had no opportunity to conform their experts' affidavits to those decisions, and hence those decisions are necessarily irrelevant to whether Merrell met its initial burden.

More importantly, to construe the "whatever is before the district court" passage in *Celotex* to mean that whether *the movant* has met its threshold burden depends in part on the adequacy of *the non-movant's* submission, as Merrell urges and as many lower federal courts apparently accept, works a radical transformation of settled principles. This Court's past decisions demonstrate that the nature of plaintiffs' proof in opposition to summary judgment is simply irrelevant to the issue presented here: whether the *movant* has met its initial burden under 56(c). For example, in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this Court noted that the plaintiff had failed to satisfy Rule 56(e), because her summary judgment opposition had contained no admissible evidence on the issue in question, *id.* at 159 & n.19 (response consisted of only "hearsay" and "unsworn" statements); nevertheless, this Court denied summary judgment because the defendant had not discharged its *own* burden "under Rule 56(c) to show initially the absence of a genuine issue." *Id.* at 159-60. No Justice in *Celotex* disagreed with the principle that "[i]f the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the Court need not consider whether the moving party has met its ultimate burden of persuasion." *Id.* at 332 (Brennan, J., joined by Burger, C.J., and Blackmun, J., dissenting).

The majority opinion in *Celotex* does not resolve these fundamental points. That opinion simply did "not clearly explain[] what is required of a moving party seeking summary judgment on the ground that the non-moving party cannot prove its case." *Id.* at 329 (Brennan, J., joined by Burger, C.J., and Blackmun, J., dissenting).

The confusion about the meaning of *Celotex* that was predicted by three Justices, *see id.*, has fully emerged. Although several circuits have followed the explicit recognition of four Justices in *Celotex* that a movant must always "show" that no genuine issue exists, based on the record materials listed in Rule 56(c) (*see* Pet. at 7 n.8), for the most part this point has not been followed by the lower federal courts. *See* Pet. at 2, 7-8. The failure to require movants to identify precise factual defects in the record obviously creates a huge incentive to file blunderbuss summary judgment motions, often forcing complete "paper trials" that serve no real purpose and waste significant judicial and private resources. *See* Pet. at 9.

Obviously, at the earliest opportunity this Court should resolve the confusion over *Celotex* which has now festered for eight years. Thus the primary issue at this juncture is whether some factual or procedural aspect of this case disqualifies it as a suitable vehicle for revisiting *Celotex*. If not, it would be inadvisable to decline review in the hope that before too long another litigant will have the persistence and the resources to pursue this issue through the lower courts and present it in a fashion adequate for this Court's review.

It would be hard to imagine a more suitable case than this one for resolving the purely legal issue of the meaning of the key confusing paragraph in the *Celotex* majority opinion. Here, Merrell conceded below and has conceded in this Court that "[t]he only item on th[e] list" of relevant record items in Rule 56(c) presented with its motion was an affidavit that is obviously inadmissible because the epidemiologist used an invalid scientific

methodology to produce his conclusion. Pet. at 3-4 & n.5;[3] *see also* note 1, *supra*. Merrell agrees with petitioners (*see* Pet. at 5, 7) that the Sixth Circuit below found that Merrell had met its burden based on the key, "whatever is before the district court" passage of the *Celotex* majority opinion. *See* Opp. at 6, 10.

Further, the parties have defined starkly divergent legal positions, promising a solid and informative clash over the core meaning of Rule 56(c) as it defines a movant's burden on summary judgment. Petitioners, backed by the opinions of four Justices in *Celotex* and perceptive opinions of the Fifth and Eleventh Circuits, argue that Rule 56(c) means what it says, and forces movants to meet their burden based on five identified types of record material. *See* Pet. at 2, 6-7. Merrell, citing the "whatever is before the district court" passage of *Celotex* and one academic treatise, urges that a whole range of material, nowhere listed in Rule 56(c), is properly considered in evaluating whether a movant has met its burden. Opp. at 9-10. Regardless of which set of arguments is most plausible, it is clear that review of this case is essential to resolve the confusion over *Celotex* and

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[3] Merrell cites this affidavit in passing (Opp. at 3, 9) but makes no suggestion that the affidavit is even conceivably admissible under the standards laid out by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), and does not deny that it "made no response, either in writing or at oral argument, to [petitioners'] detailed demonstration of the invalidity of the methodology used by [Merrell's] only expert." Pet. at 4 n.5.

Merrell does intimate, without actually arguing, that petitioners should have raised the Rule 56(c) issue sooner, noting that in the district court opposition "[p]etitioner nowhere raise[d] his current assertion that Merrell failed to meet its initial burden under Rule 56(c)," Opp. at 4 & n.9, and complaining that only in petitioners' supplemental letter brief did petitioners argue, "for the first time, that Merrell failed to satisfy its threshold burden to show an absence of a genuine issue of material fact under Rule 56(c)." Opp. at 5. But the letter brief was duly filed within a month of this Court's decision in *Daubert*, which was the basis for objecting to the admissibility of Merrell's sole affidavit. In its *de novo* review of the propriety of summary judgment on this record, the Sixth Circuit was obliged to consider all applicable law, including the new *Daubert* standard. *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517 (1993). The Sixth Circuit did just that; it assumed that the affidavit was indeed inadmissible under *Daubert*, but based on its construction of *Celotex* it held that Merrell's failure to set forth any of the record materials listed in Rule 56(c) was irrelevant. *See* Pet. at 4-5. The question of the proper interpretation of Rule 56(c) is thus squarely presented by this case.

to ensure that the summary judgment rules are applied consistently throughout the nation.

CONCLUSION

For all these reasons, the Petition should be granted.

Respectfully submitted,

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